United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1587

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1587

UNITED STATES OF AMERICA,

APPELLEE,

V.

CHESTER KASIANCZUK,

APPELLANT.

BRIEF OF APPELLANT CHESTER KASIANCZUK

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STATEMENT OF THE CASE

On April 15, 1976, a Federal grand jury sitting in Hartford, Connecticut, returned a one-count indictment charging Chester Kasianczuk with possession of an unregistered sawed-off shotgun. Title 26, United States Code, Sections 5861(d) and 5871.

On September 1, 1976, the defendant entered a plea of not guilty to the charge.

On November 10, 1976, a jury trial was held in Hartford, Connecticut, with The Honorable T. Emmet Clarie, Chief Judge for the United States District Court, District of Connecticut.

Testimony was completed on November 11, 1976, and summations of counsel and the charge to the jury were completed on the same date. At 3:46 p.m. on November 11, 1976, the jury returned a verdict of guilty. On December 13, 1976, the Court sentenced the defendant to a term of sixteen months.

In the early morning hours of March 26, 1976, the defendant, Chester Kasianczuk, was in a parked car across from the Royal Cafe in Hartford. The defendant was in the passenger's seat, Mary Beth Metz was in the driver's seat, and Peggy Prentice was in the rear passenger seat behind Miss Metz. The car belonged to Bernard Sykes (App. 9, 20-21, 24, 27).

Police Officers Boland and Murphy, who were in the vicinity, answered a call which reported a man in possession

of a sawed-off shotgun parked across from the Royal Cafe (App. 7). Upon arrival at the car, the officers ordered all parties out of the vehicle and up against the car (App. 9-11). A sawed-off shotgun was then found by the police on the floor beneath where the defendant had been sitting (App. 10-11). Shotgun shells were found in the car, in Kasianczuk's pocket, and underneath the car (App. 11).

Government witness Richard Shephard approached the car moments before the defendant's apprehension and he noticed the gun in the defendant's hands (App. 49-52).

Although defendant remained silent at the time of his arrest by local police, he testified and offered an exculpatory defense at trial. Defendant claimed he discovered the gun beneath his seat only moments before the police arrived and knew nothing of its existence prior to that time (App. 24-26, 37-38, 49-51). He also testified that upon discovery of the weapon, he intended to dispose of it by throwing it in the river (App. 39, 48, 51-52).

Defendant's version of the offense was somewhat corroborated by Miss Metz and Miss Prentice, who had been with the defendant most of the evening (App. 23-40, 53-54). Since Miss Metz took the Fifth Amendment, certain out-of-court statements made by her were elicited from another witness, Mario Conte (App. 42-48). The thrust of her in-court and out-of-court statements was that the weapon was hers and that she had hid it in the car, unbeknownst to the defendant, for the

purpose of killing the defendant's common-law wife (App. 32-34, 36-39, 45).

The Court gave a fleeting possession instruction but failed to instruct on defendant's theory of the case despite a defense request (App. 5a, 76, 81-82). Also over defendant's objection, the Court gave an instruction on constructive possession (App. 63-64, 77-78).

I. IT WAS IMPROPER FOR THE COURT TO REFUSE TO GRANT A MISTRIAL WHEN THE POLICE OFFICER TESTIFIED THAT THE DEFENDANT KEPT SILENT AFTER MIRANDA WARNINGS WERE GIVEN.

During the Government's case in chief, the Government called as a witness Hartford Police Officer Thomas J. Murphy (App. 12a). It was Officer Murphy who, along with his cohort, Officer Boland, arrested the defendant in the early evening hours of March 26, 1976, for possession of a concealed weapon (App. 14-16). Officer Murphy testified on direct examination that he advised Kasianczuk of his Miranda rights. The prosecutor then asked:

> "Q After you advised him of his constitutional rights did he make any statement to you with regard to this gun?
>
> "A No, he didn't." (App. 15-16)

Defense counsel promptly objected (App. 16-17), and the Court called a bench conference. Defense counsel moved for a mistrial, which the Court denied. Defense counsel then moved for a curative instruction which the Court gave (App. 18).

The Government then proceeded on the same line of questioning to which the objection had just been sustained and the instruction given (App. 19). This time around Officer Murphy changed his testimony and stated that Kasianczuk had said, "I don't know what you are talking about" in response to questions about the crime (App. 19)

In a recent decision, the United States Supreme Court held that

> ". . . the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving Miranda warnings violated the Due Process Clause of the Fourteenth Amendment." Doyle v. Ohio, ___ U.S. ___, 19 Cr. L. 3125 at 3128 (June 17, 1976).

The Doyle decision, supra, came just one year after the Supreme Court had, in another case, held that admission of defendant's silence at the time of arrest was more prejudicial than it was probative. United States v. Hale, 422 U.S. 171 (1975).

Whatever value to the search for truth could possibly exist when defendant's silence is brought out on cross-examination surely is lacking when the fact defendant kept silent is referred to in the Government's case in chief. Well over a decade ago, the Supreme Court recognized the principle that it was

> ". . . impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." (Citations omitted) Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966).

Kasianczuk had not even taken the stand nor had his counsel intimated in any way that he would present any evidence when the Government elicited from arresting Officer Murphy that defendant had remained silent on the morning of March 26,

1976.*/ Even as a pre-Doyle case, it is hard to imagine how this bit of evidence could have aided the Government in proving any of the elements of the offense charged. When the defendant later testified that he only had fleeting possession of the gun at the moment of his arrest (App. 49-52), the jury could not help but wonder why this exculpatory story, if true, was not told to Officer Murphy on March 26.

It might be argued by the Government that Officer Murphy's second attempt to relate what Kasianczuk had said showed not silence but a false exculpatory statement by the defendant (App. 19). Defendant's response is twofold. Even if the second version of the conversation between Murphy and the defendant was admissible, the first version clearly was not. Despite the prosecutor's feeble attempt to suggest to the Court that Murphy had simply not understood the question, Murphy never explains the inconsistency of how an arrested person could say "nothing," but also say, "I don't know what you are talking about." This Court should not assume that in Murphy's vocabulary the latter phrase is synonymous with the former.

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*/Even the three dissenting Justices in Doyle would have no problem deciding the present case in the defendant's favor. What bothered those three Justice was "the different jumble of responses" Doyle and Woods gave in response to Miranda warnings. Doyle, ibid at 3129, n.4 (Stevens, J. dissenting). While Justice Stevens may not have agreed with the majority, he simply felt, under Hale, that Doyle's "silence" was far more probative than it was prejudicial.

Secondly, the defendant's response to Miranda warnings in the present case was identical to the utterance of the petitioner in Doyle, supra at 3129 n.4. Both Kasianczuk and Doyle responded by saying, "I don't know what you are talking about." It appears that the Supreme Court has found such a response sufficiently ambiguous as to constitute an exercise of Fifth Amendment rights. Thus lower courts have held that the response of "no comment," United States v. Stevens, 538 F.2d 1203 (5th Cir. 1976), and "I did it, but I'm not going to tell you why," People v. Robinson, ___ N.E.2d ___ (Ill. App. Ct., 1st Dist.), 20 Cr. L. 2260 (November 22, 1976), to simply be in artful expressions of the right to be silent.

Although defense counsel did not specifically object to the second line of questioning of Officer Murphy, he had objected when Murphy first claimed that defendant said "nothing." He had also moved for a mistrial. The need to object a second time was not present since the first objection was simply a continuing objection to this whole line of questioning. United States v. Ghiz, 491 F.2d 599, 600 n.1 (4th Cir. 1974). A further curative instruction would only emphasize to the jury the man's silence and aggravate the harmful effect. United States v. Impson, 531 F.2d 274, 276 (5th Cir.), rehearing denied, 535 F.2d 286 (5th Cir. 1976).

More importantly, constitutional safeguards should not hinge on whether or not procedural niceties were followed. Both in open court and at the bench, defense counsel made the

trial judge aware not only of his objection to the line of questioning followed by the prosecutor but to his desire for a mistrial. The Fifth Circuit has reversed a conviction in a similar case even without an objection or a motion for mistrial. United States v. Hard, 536 F.2d 601 (5th Cir. 1976). Similarly, the Court's curative instruction in no way vitiated the harm already done. United States v. Hale, supra at 172-173, 175 n.3; United States v. Impson, supra at 278. When a prosecutor, after being warned once by a court, pursues the same impermissible line of questioning, an error of constitutional magnitude results; such error should not be deemed harmless.

II. IT WAS REVERSIBLE ERROR FOR THE COURT TO REFUSE TO INSTRUCT THE JURY ON DEFENDANT'S THEORY OF THE CASE.

One of the proposed instruction tendered by the defendant set forth the defendant's theory of the case (App. 5a). It was the defendant's theory that, although he held the gun in his hands shortly before his apprehension, he had only fleeting possession. United States v. Williams, 526 F.2d 1000, 1004 (6th Cir. 1975); 92 C.J.S., Weapons, § 5. It was his contention that he only discovered the gun under the passenger seat of the car, that the gun had been placed there by the driver, Mary Beth Metz, and that as soon as he discovered it he intended to get rid of it. There was ample evidence from Metz, Prentice, and Conte to corroborate this version of the offense, and the Government presented little evidence to rebut it (App. 23-40, 42-48, 53-54).

The Court has held that a defendant is

> "entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible . . . ." United States v. O'Connor, 237 F.2d 466, 474 n.8 (2d Cir. 1956), quoted in United States v. Alfonso-Perez, 535 F.2d 1362, 1365 (2d Cir. 1976).

As previously stated, there was ample evidence to find fleeting possession if the jury believed the defendant and the witnesses called on his behalf. The fact defense counsel may have argued this theory in his summation does not negate the need for the

instruction as the trial court suggested (App 76-77). Furthermore, to require the defendant's theory of the case to be balanced by the Government's theory is a requirement not founded in the law. Moreover, as the Court has said

> ". . . it is of some value to a defendant to have the trial judge clearly indicate to the jury what his theory of the case is, and that theory, if believed, justifies acquittal." United States v. Alfonso-Perez, supra at 1365.

While this failure alone may not be sufficient for reversal, taken in conjunction with other trial errors a new trial is mandated.

III. THE COURT ERRED IN GIVING THE JURY A CONSTRUCTIVE POSSESSION INSTRUCTION.

There was no question in the case that the defendant held the shotgun and shells in his hands for a brief period of time, and the Court was therefore entitled to give an instruction on actual possession. However, it was the defendant's contention that he found the weapon underneath the seat of Sykes' car in which he was a passenger shortly before the arrival of the police. It was his contention and that of the driver, Mary Beth Metz, that, upon discovery of the weapon, placed in the car by Miss Metz, he intended to throw it in the river (App. 23-40, 42-48, 51-52, 53-54). For this reason, the Court properly gave an instruction on fleeting possession (App. 82). Simply because the defendant had actual possession of the weapon at one point in time cannot be evidence that he had constructive possession earlier in the evening.

> "Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention and control over an object, either directly or through others." United States v. Daniels, 527 F.2d 1147 (6th Cir. 1975).

It is true that the gun was found underneath the passenger's seat where Kasianczuk had been sitting. An inference that the weapon had been there all evening would perhaps be justified. There was also evidence that the gun belonged to Miss Metz, defendant's girl friend, and that she had placed the gun

underneath the seat. But "mere presence on the scene and association with illegal possessors is not enough to support a conviction for illegal possession of an unregistered firearm." United States v. Birmley, 529 F.2d 103 (6th Cir. 1976). Similarly, flight and suspicious activity, two factors arguably present in this case, do not allow for an inference of knowledge of the gun's existence. United States v. Craig, 522 F.2d 29, 32 (6th Cir. 1975).

If defendant had been driving the car or if he were the owner, the result might call for a constructive possession instruction. One cannot infer control over contraband found in a car in which the defendant was a mere passenger. United States v. Gates, 491 F.2d 720, 721 (7th Cir. 1974). Courts have even held that knowledge of a gun in a car cannot be imputed to a driver who borrowed the vehicle. United States v. Davis, 346 F. Supp. 405 (W.D. Pa. 1972). To impute such knowledge, the law requires, absent special circumstances, that the driver own the car. United States v. Clunn, 457 F.2d 1273 (10th Cir. 1972).

Almost all the evidence presented by the Government concerned the defendant's activities during the brief period prior to his arrest. The jury may well have believed defendant found the gun underneath the seat of the car but that he had no intention of disposing of the weapon. If the jury so found, a guilty verdict would be appropriate.

On the other hand if the jury believed, as a result of the improper constructive possession instruction, that Kasianczuk knew of the gun's existence all evening and had control over it by virtue of its presence beneath his seat, the fleeting possession instruction was meaningless. The jury would have had to assume that the defendant never had any intention of disposing of Miss Metz's gun until he realized the police were approaching. For the above reason, the judgment of conviction should be reversed and a new trial ordered.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that the judgment of conviction be vacated and that the case be remanded for a new trial.

Respectfully submitted,

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Dated February 15, 1977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of Appellant Kasianczuk's brief and Appendix were hand-delivered to the Office of Albert S. Dabrowski, Esq., Assistant United States Attorney, 450 Main Street, Hartford, Connecticut 06103, this 11th day of February, 1977.

Richard S. Cramer

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